Neutral Citation Number: [2024] EWCOP 72 (T3)

Case No: COP13843260

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 December 2024

Before:

MRS JUSTICE THEIS DBE
VICE PRESIDENT OF THE COURT OF PROTECTION

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Between:

Oldham Metropolitan Borough Council	**Applicant**
-and-	
(1) KZ **(by his litigation friend the Official Solicitor)** **(2) RK** **(3) AC**	**Respondents**

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Mr Michael D Jones KC (instructed by the **Local Authority Solicitor)** for the Applicant
Ms Sophie Allan (instructed by **Stephensons Solicitors**) for the First Respondent
The Second and Third Respondents attended in person, supported by their McKenzie Friend

Hearing date: 24 October 2024
Judgment date: 4 December 2024

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Approved Judgment

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This judgment was delivered in public but a transparency order dated **22 October 2024** is in force. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of KZ must be strictly preserved. All persons, including

representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Theis DBE:

Introduction

1. These Court of Protection proceedings concern KZ, aged 20 years. Since February 2024 KZ has lived in a specialist placement, TX, that meets his needs as a profoundly deaf person. Sadly, there has been a long history of his needs not being properly met when he lived with his family until the age of 16 years, and then during his time in the care of the local authority until his move to TX in February 2024.

2. These proceedings were commenced in January 2022 and nearly concluded in January 2024 on the basis of expert evidence regarding KZ's capacity that stated he lacked capacity in all relevant areas, including residence, care and support and contact.

3. Fortunately, as a result of KZ being supported by his current placement from November 2023 prior to moving there, questions were raised about the previous capacity assessment. Dr O'Rourke, a Consultant Psychologist with expertise in assessing deaf people, was instructed in early 2024. She undertook her assessment over the course of three appointments with KZ when he was properly supported and reached a different conclusion regarding KZ's capacity. In particular, her opinion that KZ has capacity to make decisions about residence, care and support and contact with his family, save for occasions when he becomes dysregulated when he may lack capacity and in those circumstances decisions would need to be made in his best interests. Dr O'Rourke's well evidenced and reasoned conclusions are accepted by both the local authority and the Official Solicitor, as litigation friend for KZ.

4. KZ's parents, who attended this hearing supported by their own McKenzie Friend and the court interpreter, did not take issue with much of what Dr O'Rourke has stated but wish to have contact with KZ. They have not seen him since November 2023, which accords with KZ's wishes. KZ's parents have been involved in recent meetings with the local authority to discuss the way forward. The current plan is for the parents to prepare a video which will be made available to KZ, it may provide a way forward for further contact, if that is what KZ wishes. The parents initially sought an adjournment of this hearing as they said they wanted to seek legal advice. However, it became apparent that they had not acted on information about seeking legal advice previously and there was no planned representation from any solicitors they had approached. It was clear that with the assistance of their McKenzie Friend they understood the main issues in the case. The local authority and Official Solicitor resisted the application to adjourn on the basis that these proceedings had been going on for a long time, KZ resisted any further delay and had remained clear and consistent over an extended period of time regarding his wishes about remaining living at TX and not wanting contact with his parents or family. I refused the application to adjourn as it was likely to lead to further delay which was detrimental to KZ, the parents had a good understanding of the issues with the support of their McKenzie Friend and interpreter and were able to set out what they wanted in the context of their main concern being contact with KZ.

5. I had the benefit of meeting KZ the day before this hearing. In that meeting he was supported by his BSL speaking advocate, BSL speaking interpreters, his solicitor and a member of staff at TX who is known to KZ. KZ was able to let me know his views, in particular his wish to remain living at TX and an understanding of the practical arrangements and restrictions in place for him there. A note of the meeting was circulated to everyone after the meeting.

6. What that meeting did do was to enable KZ to engage with the court in a tangible way prior to the hearing. As a consequence of that engagement constructive discussions took place that resulted in KZ attending the hearing the following day. Prior to the meeting I had with him it was not anticipated his attendance at the hearing would have been possible. As the hearing was held remotely it was possible to put in place special measures that ensured it took place in a way that was fair to all parties and enabled them all to effectively participate. For example, during the hearing KZ's parents camera was switched off, and when it came to the part of the hearing when submissions were made by them KZ had the opportunity to leave the hearing, which he did with his support team remaining present. The hearing was paused at various stages to ensure KZ understood what had been said. The collaborative approach between the parties was of enormous benefit to KZ, as it ensured he participated in the hearing in a way that was meaningful for him.

Relevant Background

7. There is limited information about KZ's early history. He was born in Pakistan, is one of five children and went with his family to live in Spain as a young child before moving to the United Kingdom.

8. KZ has a cochlear implant but does not use it, preferring to use British Sign Language (BSL) but his parents do not sign.

9. In 2014 KZ was referred to Deaf Child and Adult Mental Health Services due to behavioural difficulties and the home environment.

10. He was first referred to children's services in late 2014.

11. In early 2015 KZ presented with bruising to his cheek and alleged it had been caused by his father pushing him so he fell on a table. He later withdrew the allegation.

12. In late 2015 he was reported to be breath-holding and to exhibit some sexualised and aggressive behaviour towards females.

13. A Child and Family assessment completed in November 2016 records the family were struggling to meet the needs of the children.

14. At a Child in Need (CIN) meeting in January 2017 concerns regarding KZ included poor social skills, reluctance to take medication, inappropriate behaviour, watching adult content on his computer, aggressive behaviour and self-injury. These concerns continued during 2017 and 2018.

15. In August 2018 KZ made allegations of sexual abuse against his sibling and concerns were raised regarding his behaviour towards his siblings. A subsequent strategy meeting concluded the allegation was unsubstantiated. A CIN meeting noted the difficulties in his behaviour, he had no school provision and was living temporarily in a hotel room with his father. A s47 enquiry and records detail alleged sexualised behaviour within the family. In order to manage the risk KZ had been moved out of the family home and placed in a hotel with his father with four hours additional support to safeguard him when he was in public.

16. KZ and his siblings were made the subject of a Child Protection Plan on 3 September 2018.

17. An educational placement was found for KZ. In February 2019 KZ reported to his school that he had exhibited sexualised behaviour towards his sister.

18. A safety plan was developed and in May 2019 it was recorded KZ was living at home, was supervised by his father who would share a bedroom with him to manage the risk. This followed a year of living in hotel accommodation with his father with support from care staff where records set out there had been a significant increase in the behaviours which KZ was directing at other people, including support staff and his father.

19. An Assessment Intervention and Moving on (AIM) assessment was undertaken with KZ in January 2019 which concluded he required a high level of supervision as it was noted he was unable to see how his behaviour could harm himself and others. At that point KZ was receiving 2:1 support on a 24 hour basis.

20. At a panel meeting in April 2019 it was recorded KZ had not been in school since March 2019 and was living in a hotel room with his father which had given him notice.

21. On 11 September 2019 it was reported KZ had taken a screen shot of a female from the website of a local college, made a poster and wrote sexual references on the image. A few days later the college reported KZ had attacked three students following an altercation with a female. The following day KZ attended college and was reported to be fixated with a female member of staff. KZ was arrested by the police.

22. A strategy meeting was called in late September 2019 due to concerns regarding KZ's sexualised behaviour.

23. In late 2019/early 2020 concerns were reported of KZ presenting at schools and being the subject of physical assaults by others in the community.

24. In December 2020 and April 2021 KZ was reported missing to the police as part of the safety plan.

25. KZ was seen by SALT (speech and language therapy) in January 2021 who considered his language skills limit him to concrete thinking and the assessment suggested more abstract concepts and hypothetical thinking are less familiar to him. Also in January 2021, KZ was assessed by a Consultant Psychiatrist who considered KZ may have emerging psychosis, questioned the ADHD psychosis and whether the diagnostic

overshadowing of KZ's deafness, significant communication deprivation and problematic behaviour had led to this diagnosis without the underlying pathology.

26. In February and March 2021 KZ was reported to the police as missing from home on occasions as part of the safety plan. This continued in April 2021, on one occasion KZ attended the address of a woman who expressed concern regarding her safety and that of her children, there were reports from the woman that this had happened on many occasions.

27. KZ was reported missing from home on many occasions in May and June 2021.

28. In June 2021 KZ was arrested on three counts of stalking charges. Such behaviour was reported to be continuing in July 2021 and KZ was arrested, then released on bail with no charges.

29. In July 2021 the local authority issued proceedings in the High Court seeking orders under the inherent jurisdiction that would authorise the deprivation of KZ's liberty.

30. A placement, TE, was identified for KZ provided by a private care agency. It was a specialist eight bed unit, including a two bedroom apartment for KZ staffed on a 2:1 basis, some of whom were said to be BSL trained. MacDonald J authorised the deprivation of liberty and KZ moved to that placement in the summer of 2021.

31. KZ started attending school in September 2021 and was transported to and from there by his father.

32. On 19 October 2021 Dr Rippon completed a capacity assessment of KZ and concluded KZ lacked capacity in all areas.

33. On 17 January 2022 following KZ turning 18 years, the local authority issued proceedings in the Court of Protection and MacDonald J granted interim declarations relating to capacity and authorised the continuation of the care arrangements that amounted to a deprivation of KZ's liberty.

34. In May 2022 Dr Rippon's addendum report regarding KZ's capacity concluded her opinion in relation to capacity remained unchanged.

35. In February 2023 at a further hearing before MacDonald J the order records the following: '*the Court expressing significant concern that the applicant local authority is manifestly failing in its duties towards KZ and directing a written statement from the acting head of service at the local authority in relation to the current situation and addressing the concerns raised by KZ's representatives*.'

36. On 24 October 2023 the private care agency notified the local authority that the relevant housing association had served notice on all residents at the TE due to the need to undertake urgent restoration work. KZ was moved to an alternative property whilst the local authority investigated alternative placement options. At about the same time KZ commenced support from TX as a prelude to him being placed there.

37. On 23 January 2024 MacDonald J approved the proposed placement for KZ in the TX, directed a further capacity report and allocated the case to me.

38. KZ moved to TX on 7 February 2024.

39. On 16 May 2024 Dr O'Rourke completed her first report in relation to KZ's capacity.

40. On 23 May 2024 I made further directions and fixed the next hearing in June 2024. That hearing was then vacated due to late disclosure of previous unseen records from KZ's placement. Further directions were made, including for an addendum report from Dr O'Rourke.

41. Dr O'Rourke completed her addendum report on 4 June 2024, with two further reports on 28 August 2024 and 21 September 2024.

42. On 14 October 2024 the local authority held a meeting with KZ's advocate and staff from the TX to discuss KZ's care and support plan/contact with the family. KZ's social worker met with KZ's father, sister and their family advocate the following day to discuss the evidence and plans.

43. KZ's updated care and support plan was completed on 15 October 2024.

44. On 21 October 2024 an advocates meeting was held with KZ's father attending supported by his advocate.

45. On 23 October 2024 I met KZ and heard submissions from the parties on 24 October 2024.

Capacity evidence

46. As can be seen from the history above Dr Rippon, Consultant Developmental Psychiatrist, undertook a capacity assessment in October 2021 and concluded that KZ lacked capacity to conduct proceedings and make decisions in relation to his residence, care, engaging in sexual relations, receiving the Covid-19 vaccine and his medication. In an addendum report in early 2022 Dr Rippon concluded KZ also lacked capacity in relation to contact, his use of the internet and social media and his financial affairs. In her report she stated the following regarding the diagnostic element of the statutory test *'In my opinion, KZ's complex collection of areas of difficulty would be viewed as an impairment of, or disturbance in, the functioning of the mind or brain, as described in the Mental Capacity Act 2005 and have an adverse impact on his decision-making capabilities'*

47. In her report Dr Rippon identified that KZ had a diagnosis of a borderline learning disability, whilst he presented with some autistic features.

48. Following KZ's engagement with and then placement at the TX questions were raised regarding Dr Rippon's conclusions on the basis that it appeared she was assisted during her assessment by the service manager of the TE, who acted as a BSL interpreter for the purposes of her assessment. The TX assessors understood the service manager held BSL level 1 training. They considered any mental capacity assessment should be

supported by a Registered Sign Language Interpreter being present with a service manager and/or someone such as his Independent Deaf Advocate and Deaf Relay in support. Without that they did not consider there could be reliance upon 'surface level' interpretations of the language KZ presented/displayed at that time and KZ's communication had not been optimised, especially as many concepts (such as court) were new to him.

49. Although initially it was planned for the further assessment to be undertaken by Dr Rippon, the parties subsequently agreed it should be undertaken by Dr O'Rourke, Consultant Clinical Psychologist. She has now met KZ on three occasion, twice in preparation of her first report and once in relation to her addendum report.

50. Dr O'Rourke's initial assessment raised a number of important points, summarised as follows:
    (1) She considered KZ is *'very far from the diagnosis of a learning disability'* and the previous assessment by Dr Rippon should be discarded as it was undertaken by a non-deaf specialist without suitable specialist interpreting support.
    (2) In KZ's case the effect of language deprivation on his understanding of the world around him, and how he relates to that world appear to have been extreme and as a result his attainment of knowledge and skills has been far below his potential.
    (3) KZ's case is one of extreme language deprivation. His previous label of a 'borderline learning disability' is inaccurate and has arisen due to use of assessments which are not valid for deaf people.
    (4) There is no evidence to suggest a diagnosis of ADHD, psychosis or OCD and any assessment for autism should be put on hold until KZ has been given the opportunity to develop further in his placement.
    (5) KZ lacks the capacity to conduct court proceedings and is unlikely to gain this in the future due to the complex and abstract nature of the concepts involved.
    (6) KZ has capacity in relating to residence with a qualification that he is vulnerable to influence and if in future he is influenced to move from the TX against the advice of professionals his capacity would need to be reassessed.
    (7) KZ has capacity to make decisions regarding his care needs, his understanding and ability to reflect on his own needs is limited by lack of experience of what is possible, but he is developing all the time.
    (8) KZ has capacity to make decisions regarding his medication. In the event he became mentally unwell, this may need to be reviewed.
    (9) KZ lacks capacity to engage in sexual relations. There is much he does not understand, has no experience of relationships and does not understand matters of consent. Dr O'Rourke considered that KZ has the capacity to understand these matters and could potentially develop capacity in this area.
    (10) As regards contact KZ has capacity regarding family members who he has direct experience of. In novel situations, including via the internet this may breakdown in a situation of risk or vulnerability where KZ is likely to present as naïve, allowing people to take advantage of him. His capacity in such circumstances would need to be reassessed. His ability to appreciate his vulnerability is limited but has the potential to develop over time and should be kept under review.
    (11) KZ lacks capacity in relation to internet use and social media and is vulnerable in this respect due to a lack of learning and development. Over time he could gain capacity in this area.

(12) KZ lacks capacity regarding financial decisions and to sign a tenancy agreement but, again, Dr O'Rourke considers he may be able to gain capacity in these areas.

51. As regards the diagnostic element of the statutory, test Dr O'Rourke sets out that whilst 'Language Deprivation Syndrome' is not a recognised disorder it is recognised within the literature pertaining to deaf people, who have developed in disadvantageous circumstances without access to BSL and unable to make use of residual hearing and oral means of communication. In her report Dr O'Rourke referred to the observations made by Ms Gollop KC (sitting as Tier 3 Judge of the Court of Protection) in *TW v Middlesbrough Council* [2023] EWCOP 30 at [30] '*The impairment, which operates as a functional learning disability, is the result of stunted mental development, occurring before the age of 18 years, as a result of prolonged deprivation of communication, education, social learning and life experience, in combination with institutionalisation.'.*

52. Dr O'Rourke answered further questions from the parties in her report dated 4 June 2024.

53. In her first addendum report dated 28 August 2024, after she had been provided with information from TX about incidents involving KZ, Dr O'Rourke stated her substantive position in relation to capacity did not change, although she provided some clarity on a number of issues. Her report further considers the issue of impairment under s 2(1) MCA 2005 and states *'The individual functions very much as if they have a learning disability, although the origin of it is deprivations, rather than organic impairment of the brain from birth'.*

54. Dr O'Rourke's second addendum report, dated 21 September 2024, which considered additional records from the TX included the following matters:
    (1) KZ remained adamant with Dr O'Rourke that he did not want contact with his family and could give an account of a video call with the family that ended badly when the family put pressure on him to return home.
    (2) KZ was able to articulate that some of the behaviours he had exhibited towards staff were inappropriate and upsetting although accepted that following the rules of the placement was a condition of residing there.
    (3) The staff supporting KZ's educational activities advised Dr O'Rourke that KZ's mood and tiredness can have an impact on his engagement in education and his ability to listen. If he becomes agitated and upset he can find it difficult to reason and maintain an understanding of cause, effect and consequence of his actions.
    (4) The staff at the placement strongly felt that phone and internet use were difficult to manage.

55. Dr O'Rourke concluded as follows regarding KZ:
    (1) KZ has capacity to make decisions regarding his residence and can discuss and weigh the relevant information when he is calm. However, if he becomes upset or agitated he is likely to lose the ability to use and weigh information and *'his capacity therefore fluctuates and decisions made in the heat of the moment when upset are unlikely to be capacitous'.* She considered if KZ requested to leave the placement when he is upset or agitated it is highly likely he would have lost the ability to weigh and use the relevant prices of information and would have lost capacity.

(2) KZ is unlikely to have capacity to manage his property and financial affairs, although is able to understand basic concepts such as paying money for rent.
(3) KZ is able to understand the reasons for 2:1 support and has capacity to make decisions regarding his care arrangements however capacity can fluctuate about this in the same way as it does for residence.
(4) KZ lacks capacity to make decisions regarding social media and internet access and restrictions will be required in KZ's best interests.
(5) As regards capacity about contact with others that is subjective and depends on the individual concerned and the nature of the relationship. KZ has capacity to make decisions regarding contact with family members, albeit he may lose this when angry or upset.

56. In response to further questions Dr O'Rourke stated that KZ *'when in an aroused state, he becomes very focussed on his point of view/complaint and also unable to take in new or balanced information. This is very different to at other times when he is calm and can see different points of view and discuss these'.* She continues *'It is not difficult to identify when [KZ] is aroused. Staff can easily identify this and should be aware that his decisions may not be capacitous at this time. If for example he is angry and says he is going to leave the [TX], in the heat of the moment, after an altercation with staff, this is likely to be a decision which is lacking in capacity. If he later calms down and can discuss the pros and cons of remaining or staying but maintains that he wishes to leave , this is likely to be capacitous, albeit unwise. For major decisions, I would expect staff to check over time that he maintains his position and is able to do this whilst weighing up different points of view.'*

The care plan

57. The local authority have filed a detailed care plan dated 17 October 2024 which sets out the detailed arrangements for KZ's care continuing at TX, including the restrictions in place underpinned by the structure of the three monthly reviews.

Legal Framework

58. The MCA sets out the statutory framework for dealing with capacity with the important fundamental principle enshrined in s 1(2) that *'a person must be assumed to have capacity unless it is established that he lacks capacity'.* Sections 1 (3) – (4) MCA provide further general principles relevant in considering the question of an individual's capacity:

> *'(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him do so have been taken without success.*
>
> *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.'*

59. Section 2(1) MCA defines a person who lacks capacity as *'…a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain'.*

60. Section 3(1) MCA provides that for the purpose of s2(1) a person is *'unable to make a decision'* if they are unable to:

a. Understand the information relevant to the decision.
b. Retain that information.
c. Use or weigh that information as part of the process of making the decision; or
d. Communicate that decision.

61. Section 3 (2) – (4) MCA 2005 outlines further guidance on the application of the 'functional test' in section 3(1) as follows:

'(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is unable to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as being unable to make that decision.

(4)The information relevant to a decision includes information about the reasonably foreseeable consequences of: a deciding one way or another; or b. failing to make the decision.'

62. The material parts of sections 5 and 6 MCA 2005 provide:

's 5 (*1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if—(a)before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and (b)when doing the act, D reasonably believes—(i)that P lacks capacity in relation to the matter, and (ii)that it will be in P's best interests for the act to be done.*

(2)D does not incur any liability in relation to the act that he would not have incurred if P— (a)had had capacity to consent in relation to the matter, and (b)had consented to D's doing the act…'

s6 (1)If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.

(2)The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.

(3)The second is that the act is a proportionate response to—

(a)the likelihood of P's suffering harm, and

(b)the seriousness of that harm.

(4)For the purposes of this section D restrains P if he—

(a)uses, or threatens to use, force to secure the doing of an act which P resists, or

(b)restricts P's liberty of movement, whether or not P resists…'

63. Section 15 MCA 2005 provides power for the court to make declarations as follows:

(1)The court may make declarations as to—

(a)whether a person has or lacks capacity to make a decision specified in the declaration;

(b)whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c)the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2)"Act" includes an omission and a course of conduct.

64. The relevant parts of Section 16 MCA 2005 provides powers to make decisions and appoint deputies as follows:

'(1)This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning—

(a)P's personal welfare, or

(b)P's property and affairs.

(2)The court may—

(a)by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b)appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

(3)The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).'

65. In *Leicestershire County Council v P and Another (Capacity: Anticipatory Declaration)* [2024] EWCOP 53 at [137] I concluded that the court did have jurisdiction to make an anticipatory declaration under s 15 (1) (c) MCA 2005, although declined to make such a declaration on the facts of that case.

66. In this case the issue turns on whether an anticipatory declaration as to capacity can be made under s16 MCA 2005 due to the requirement under s 4A (4) MCA 2005 that a deprivation of liberty is only authorised if it is made pursuant to an order under s16 (2) (a) MCA 2005, which, in turn, depends on the court having primary jurisdiction under s 16 (1) MCA 2005.

Submissions

67. Mr Jones KC on behalf of the local authority accepts Dr O'Rourke's evidence that the diagnostic element of the statutory test is established in this case by virtue of the conclusions that KZ suffers from language deprivation syndrome.

68. Mr Jones submits that KZ has capacity to make decisions regarding his residence, care and support and contact with his family, except when presenting in a state of heightened arousal and anxiety. He submits the evidence in this case is that the staff at the TX are readily able to identify when KZ suffers a behavioural incident which compromises his capacity to make decisions. In her third addendum report Dr O'Rourke addresses how his mental impairment in the form of a functional learning disability, creates an inability to weigh and use information. In her opinion language deprivation has led to a lack of learning and development in relation to social and emotional functioning, including how to manage his emotions when upset. Dr O'Rourke states: *'Such self-management skills are difficult to acquire without language and are often nuanced and implicit. [KZ's] experiences have not allowed him to develop such skills and therefore this aspect of his presentation is due to his 'functional learning disability' as described'.*

69. KZ's social worker and the support staff at the placement are clear that it is not difficult to identify when KZ is aroused, as a result the local authority have been able to devise a care plan that describes the behavioural signs that would indicate a compromise in his ability to use and weight information, and provide staff with guidelines on how to deal with that.

70. On the particular facts of this case, the local authority submit that anticipatory declarations are workable, so that in circumstances where, for example, KZ's capacity deteriorates and he attempts to leave the placement, refuse support/supervision, or absconds in the community staff will be able to provide care in accordance with his care and support plan, including maintaining 2:1 supervision both within the placement and in the community in the event KZ refuses the same. Any such actions constituting constant supervision against KZ's expressed wishes during periods when he lacks capacity will interfere with his Article 5 and 8 rights and would therefore require lawful authorisation.

71. Mr Jones submits it is possible that s 16(1) MCA 2005 can apply in situations such as KZ's where his capacity in relation to his residence and care arrangements lapses during behavioural episodes which take place usually on a daily basis. In *GSTT v SLAM and R* [2020] EWCOP 4 Hayden J was dealing with an obstetric case where the declaration sought related to a situation where P may lose capacity at a future date (during delivery/birth), which is different than a situation to that in which P does lose capacity on a daily basis, possibly on multiple occasions. Mr Jones submits that the wording of s 16 (1) MCA 2005 that '*This section applies* ***if*** *a person ('P') lacks capacity…'* (emphasis added) means that a case such as KZ's is not excluded where the evidence

demonstrates capacity is lost on a regular basis as compared to circumstances such as faced Hayden J where P was capacitous, but there was a high risk of her losing capacity in labour.

72. If Dr O'Rourke's evidence is accepted this is not a case where there is a risk that KZ will lose capacity, it is a case where he does lose capacity, albeit it fluctuates. Mr Jones submits it cannot have been the intention of parliament to exclude those in KZ's situation outside the safety net of the MCA 2005 in making anticipatory declarations authorising care arrangements which would amount to a deprivation of P's liberty. It would appear wrong in principle for the court in such circumstances only to take a longitudinal approach to capacity which does not promote capacity in the way that the principles in s1 MCA 2005 requires, and is not expressly provided for in the MCA 2005. The evidence demonstrates that for the majority of the time KZ has capacity to make decisions regarding his residence and care arrangements. The behavioural incidents that result in a loss of capacity appear to be time limited and staff are adept at resolving and de-escalating the situation. In the meeting on 14 October 2024 the care staff estimated they happen twice a day, are often only for a brief period and KZ is quick to reflect upon his actions once calm. In those circumstances, the least interventionist approach to capacity that promotes KZ's autonomy and capacity would be achieved by making an anticipatory declaration as compared to the longitudinal one. As this may occur on a regular basis Mr Jones submits it is not appropriate to rely on the provisions of s5 and 6 MCA 2005 alone.

73. Turning to the question of contact with others the local authority agrees with Dr O'Rourke that KZ has capacity in relation to making decisions about contact with his family as they are known to him, although there may be occasions when that capacity fluctuates. In the care plan the local authority propose two weekly telephone calls during which KZ can chose whether or not he wishes staff to remain present and support him. As regards other contact what is proposed is that KZ's family make a video for him which can be seen by KZ, if he wishes. KZ currently remains resistant to direct face to face contact with his family and the local authority consider KZ's wishes should be respected in this regard. In relation to making decisions about contact with others KZ's capacity will have to be considered on an ongoing basis as it is difficult to assess this area in the abstract.

74. As regards the other areas of capacity (namely decisions relating to sexual relations, finances, entering into a tenancy agreement, social media and internet access and conducting litigation) the local authority accept Dr O'Rourke's opinion that each of these issues KZ lacks capacity as they involve concepts which KZ has not yet learned, albeit these areas of capacity can be re-visited in line with his progress and learning development in due course. The most recent care plan sets out restrictions on KZ's internet use, limited to one hour unsupervised per day. His internet history can be monitored by staff. KZ wishes for unrestricted access. Steps are being taken for KZ to have a smart phone, which will have the same restrictions.

75. The local authority remain clear that KZ's care plan should provide for 2:1 support in the light of the recent incidents that have been recorded by TX. KZ seeks for a reduction in that support but the TX have made it clear that at the current time they would not support the continued placement with them if there was a reduction in support. It is recognised that when KZ has capacity he is able to refuse the provisions of 2:1 support,

however KZ's deaf advocate has confirmed KZ recognises that 2:1 support is part of the rules that underpin the placement. KZ's deaf advocate has confirmed KZ wishes to remain living at the TX and accepts that abiding by the rules is necessary in order to do so.

76. The care plan provides for a three monthly review of the level of supervision regarding KZ, which includes the level of support. The notes of the review meeting on 14 October 2024 set out that the placement would be willing to trial a reduction to 1:1 during the night.

77. In his written submissions Mr Jones outlines the declaration sought by the local authority as follows:

IT IS DECLARED PURSUANT TO SECTIONS 15 AND 16 OF THE MENTAL CAPACITY ACT 2005 THAT:
i) KZ has capacity to make decisions regarding his residence and care arrangements and regarding contact with his family, except when presenting in a state of heightened arousal and anxiety during which episodes it is declared that he lacks capacity to consent to care and treatment provided by the applicant, their staff and/or agents.
ii) In circumstances where the applicant, their staff and/or agents reasonably believe that KZ is experiencing a state of heightened arousal and anxiety, and as such KZ lacks capacity to make decisions about his care arrangements, it shall be in KZ's best interests for the applicant, their staff and/or agents to deliver care to KZ in accordance with his care plan.
iii) To the extent that the arrangements set out at paragraph (ii) and the care plan amount to an interference with KZ's rights and may amount to a restriction and/or deprivation of KZ"s liberty, they are declared lawful and authorised, providing always that any measures used to facilitate or provide the arrangements shall be the minimum necessary to protect the safety and welfare of KZ and those involved in his care, and that all reasonable and proportionate steps are taken to minimise distress to KZ and to maintain his dignity.

78. The local authority submits declarations should be made for a period of 12 months to remove the anxiety of ongoing active court proceedings and to enable the focus be on supporting KZ in taking further steps to help regain his capacity.

79. The focus of KZ's parents' position related to issues regarding contact. They were clear they wished to have contact with KZ and were unable to comprehend that this was not what KZ wanted. They acknowledged the matters that had been discussed in the meeting they attended and indicated their agreement to preparing a video to be sent to KZ.

80. Ms Allan on behalf of KZ makes it clear that he is very settled in his current placement and wishes to remain living there. The Official Solicitor accepts Dr O'Rourke's evidence regarding KZ's diagnosis and capacity and supports the submissions made by the local authority. It is accepted that when KZ loses capacity the current care plan constitutes a deprivation of KZ's liberty that requires authorisation and that this is best met by the anticipatory declarations sought.

Discussion and decision

81. There is no evidential issue regarding the conclusions reached regarding KZ's capacity or the legal framework that should govern the aspects of KZ's capacity that fluctuate, namely residence, care and support and contact with his family. It is right that KZ's parents struggle to understand KZ's current capacitous wish that he does not want to have contact with them but appeared willing to engage with the proposals made about recording a video from them for KZ.

82. I accept Dr O'Rourke's assessment of KZ's capacity. Her expertise in the assessment of deaf people is extensive and is detailed at the start of her first report. She met KZ on three occasions. Her first report details the adjustments that are needed when assessing general cognitive abilities noting *'Intellectual capacity should be distinguished from attainment of skills and knowledge and the test results should be interpreted as an indication of potential, rather than actual attainment and functioning. The deaf child growing up in a hearing world has limited access to information, both in terms of formal education and incidental learning. This means that a deaf adult may have significant gaps in knowledge and understanding, which is the effect of deprivation of information rather than lack of ability. This is often most striking in social and emotional functioning. In [KZ's] case, the effects of language deprivation on his understanding of the world around him, and how he relates to that world appear to have been extreme and therefore his attainment of knowledge and skills have been far below his potential'.*

83. Dr O'Rourke outlines in her report the progress KZ has made now he is in an environment that properly meets his needs. Like providing a plant with water and light in order to grow, KZ's cognitive functioning and communication skills have blossomed and developed significantly now he is in that nurturing and supportive environment. This, in turn, has had a positive impact on KZ's behaviour due to his increased understanding and ability to communicate.

84. The evidence in this case accords with that in *DN*. As in that case, the evidence here demonstrates it is clear to those who care for KZ when he becomes dysregulated so that he is likely to lose capacity. The making of an anticipatory declaration would provide a proper legal framework for the care team, ensuring that any temporary periods of deprivation of liberty are duly authorised and thereby protecting them from civil liability.

85. This differs from the situation in *A Local Authority v PG (by her litigation friend, the Official Solicitor) and an NHS Integrated Care Board* [2023] EWCOP 9 where the facts presented Lieven J with the position which she described as follows:

    '[29] PG's case poses a number of challenges in trying to determine whether she has capacity in respect of the decisions in issue. Firstly, the evidence suggests that she does at times have capacity within the terms of s3, but at other times she probably does not. Secondly, there is a close correlation between times when she may not have capacity and the making of what would plainly be considered unwise decisions. Thirdly, there is also some correlation between her making of unwise decisions and her being intoxicated.'

86. In her analysis Lieven J recognised the two options, either to take a longitudinal view regarding capacity (following Sir Mark Hedley in *Cheshire West v PWK* [2019] EWCOP 57) or that of Cobb J in *DN* and making anticipatory declarations in respect of when PG has the equivalent of a 'meltdown'. Lieven J continued:

'[36] *Having analysed the facts of those cases, and, considered those of PG, I do not think that one or other is the correct or indeed better approach. How an individual P's capacity is analysed will turn on their presentation, and how the loss of capacity arises and manifests itself. Both the decisions in issue here are ones that arise on a regular basis and often not in planned or controlled situations. That will influence how decisions about capacity are approached.'*

At [37] she stated:
'In deciding the issue I must have regard to the importance of making orders that are workable and reflect the reality of PG's 'lived experience'…It is a principle of statutory construction that the Court must have regard to the 'mischief' of the statute. One of the mischiefs of the MCA is to seek to preserve an individual's autonomy, but in a way that ensures that when they do not have capacity, their best interests are protected'.

Lieven J expressed at [38] her
'*...concern about making an anticipatory declaration in a case such as this, as it would in practice be unworkable for those caring for PG. Unlike DN, PG does not have capacity in relation to decisions around her care, both when at home and in the community. Although when calm, she does at times make capacitous decisions within the meaning of section 3(1).'*

At [43] Lieven J concluded on the evidence that she would take the longitudinal approach as
'*An anticipatory order would in practice be close to impossible for care workers to operate and would relate poorly to how her capacity fluctuates. The care workers would have to exercise a complicated decision making process in order to decide whether at any individual moment PG did or did not have capacity. This might well vary depending on the individual care worker, and how much of the particular episode they had witnessed or not. The result would fail to protect her, probably have minimal benefit in protecting her autonomy and in practice make the law unworkable.'*

87. The evidence in relation to KZ from those who care and support him are clear when he becomes dysregulated. There is a largely consistent team who care for KZ so there will be a consistency in approach in assessing when KZ loses capacity.

88. I am satisfied on the particular facts of this case the right approach, which accords with the evidence in this case and the key principles set out in s1 MCA 2005, is for the court to make the anticipatory declarations sought by the local authority, supported by the Official Solicitor on behalf of KZ, regarding KZ's capacity to make decisions regarding residence, care and support and contact with his family. This will manage the periods when he loses capacity, which can be clearly identified by those who care for him, so there is clarity regarding the legal framework that supports decisions made on his behalf but also, rightly, promotes his capacity. As Dr O'Rourke stated in her first report KZ has made great progress since he has been at the TX but *'they are still working on the building blocks of language and understanding about the world. In some areas which*

are more complex and nuanced, his learning and development will need to take place, naturalistically over time, for example by modelling and discussing conflict resolution, as issues with peers arise.'

89. Dr O'Rourke's conclusions in her first report neatly encapsulate the positive impact for KZ when she states he '*has made great progress since moving to the [TX] and has capacity to make decisions in a number of areas. In other areas he requires further input which is likely to lead to his gaining capacity. He remains vulnerable to exploitation and malign influence, due to his lack of knowledge about the world and the risks therein'.*

90. Save for residence, care and support and contact with his family I accept Dr O'Rourke's evidence that KZ lacks capacity in the other areas.

91. As regards KZ's best interests the transformation for him since he has been at the TX is clear and obvious to see. The striking feature about the evidence of the support he has at the TX is they are properly attuned to his needs and in that environment he has thrived, in particular through the significant development in his ability to effectively communicate with others, not just about his situation now but gain a greater understanding of his experiences in the past.

92. KZ continues to progress at the TX, enjoys the education work and specialist support he receives and expresses the wish that he had begun learning sooner. KZ is able now to speak more about his family and the historic allegations of abuse and mistreatment. Whilst there has been a reduction in recorded behavioural incidents the TX consider there is an association between KZ discussing his family and becoming dysregulated. That is not surprising having regard to the history of this case.

93. KZ has consistently said he wishes to remain living at the TX. Whilst he would prefer a reduction in the 2:1 support he understands the need for it as part of the rules that enable him to remain at the placement.

94. The carefully calibrated care plan put forward by the local authority fully meets KZ's best interests and accords with his wishes. I recognise it is not fully supported by KZ's family but when balanced with the overwhelming evidence of how KZ's placement at the TX is meeting KZ's needs I am satisfied that care plan is the right plan for KZ and accords with what his best interests require and demand.

95. On the information Dr O'Rourke had she makes a number of trenchant comments about the support that has historically been provided to KZ. She is critical of assessments by non-specialists over the years that have been detrimental to KZ. They have been the foundation of the lack of understanding as to how KZ's needs should be met and have played a large part in KZ's language deprivation. Dr O'Rourke considers KZ's placement at TE was detrimental to KZ and *'traumatic'* and in relation to that placement Dr O'Rourke states *'it is frankly astonishing that the one professional with BSL thought it appropriate to act as an 'interpreter' in previous assessments, since he would have had enough awareness to realise he was not qualified to do so'.* As Dr O'Rourke reports KZ '*contrasted the staff at the [TX], who treat his information with respect, with [the TE] staff who he alleged read about his history and used it to bully and laugh at him'.*

96. As regards wider issues concerning the assessment of mental capacity of deaf individuals the following should be an essential part of any such assessment. The experience in this case demonstrates the use of a non-specialist expert is not an appropriate substitute for the specialist assessment and risks incorrect conclusions regarding capacity being reached. Where an assessment is required the following considerations should guide any assessment of a deaf individual fluent in BSL:
    (1) Any mental capacity assessment of a deaf individual fluent in BSL should ideally be undertaken by an assessor who is suitably qualified to communicate at the relevant level of BSL. If that is not done, there should be a clear explanation why and what measures, if any, are proposed to be in place to manage that gap.
    (2) The assessor should ideally have a background in understanding deafness and engaging with the deaf community. If they don't, there should be a clear explanation why they are undertaking the assessment without such knowledge.

97. These essential steps should prevent the difficulties encountered in this case occurring again. They accord with the wider provisions regarding expert evidence in Part 15 Court of Protection Rules 2017 which make clear '*it is the duty of an expert to help the court on matters* ***within his own expertise'*** (emphasis added) (PD15A paragraph 2). There is an obligation on those proposing an expert instruction, and on the expert themselves, to make sure that expert has the requisite expertise to prepare the expert report being sought.